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KHOIRUL YAHAYA v. LEMBAGA PENCEGAHAN JENAYAH & ANOR

HIGH COURT MALAYA, MELAKA
VAZEER ALAM MYDIN MEERA J
[CRIMINAL APPLICATION NO: 44HBC-05-10-2016]
B 13 JUNE 2017

CRIMINAL PROCEDURE: *Habeas corpus – Preventive detention – Application for habeas corpus – Allegation that detention flawed and unlawful – Whether applicant informed of grounds for detention – Whether there was inordinate delay in bringing applicant before inquiry officer – Whether findings of inquiry officer explained to applicant – Whether quorum for sitting of Prevention of Crime Board in compliance with statutory provisions – Whether there was infringement of art. 151 of Federal Constitution – Whether there was non-compliance of relevant provisions of Prevention of Crime Act 1959 – Prevention of Crime Act 1959, ss. 6, 7B, 9, 10(2), 19A(1) & 23*

CONSTITUTIONAL LAW: *Fundamental liberties – Preventive detention – Application for habeas corpus – Whether applicant informed of ground for detention – Whether there was infringement of art. 151 of Federal Constitution*

PREVENTIVE DETENTION: *Detention – Detention order – Application for habeas corpus – Whether procedure for detention complied with – Whether there was infringement of art. 151 of Federal Constitution – Whether there was non-compliance of relevant provisions of Prevention of Crime Act 1959 – Whether detention flawed and unlawful – Prevention of Crime Act 1959, ss. 6, 7B, 9, 10(2), 19A(1) & 23*

The applicant was directed to be detained for two years at the Pusat Pemulihan Khas Bentong pursuant to a detention order ('the order') issued under s. 19A(1) of the Prevention of Crime Act 1959 ('the Act') by the Prevention of Crime Board ('the first respondent'). Dissatisfied with the order, the applicant filed the present application for a writ of *habeas corpus* for his release, primarily on the grounds that the detention was flawed and unlawful due to (i) the infringement of the applicant's constitutional rights under art. 151 of the Federal Constitution ('FC') since he was not informed of the grounds for his detention; and (ii) non-compliance of (a) s. 9 read together with s. 6 of the Act as there was an inordinate delay in bringing the applicant before the inquiry officer ('the IO'); (b) s. 10(2) of the Act as the officer having custody of the applicant ('the police inspector') did not explain the findings of the IO when the same was served on the applicant; (c) s. 19A(1) read together with and s. 7B of the Act as there were four members of the first respondent present during the meeting, instead of three as provided by the said provisions; (d) s. 10(2) read together with 19A(1) of the Act since the police inspector, when questioned at the sitting of the first respondent, had apparently admitted that the applicant had not committed

any offence; and (e) art. 151 of the ('the FC') read together with s. 23 of the Act. According to the applicant, under s. 19A(4) of the Act, he was entitled to make representations to an Advisory Board constituted under art. 151(2) of the FC in accordance with the prescribed procedures found in the Prevention of Crime (Advisory Board Procedure) Regulations 2014 ('the Regulations') made by the Minister pursuant to powers under s. 23 of the Act. The applicant submitted that s. 23 of the Act does not give powers to make regulations regarding the formation, role, function and procedural rules of the Advisory Board and therefore the Regulations were *ultra vires*, invalid and void.

Held (dismissing application):

(1) The applicant's complaint that he was not informed of the ground for his detention as prescribed in art. 151 of the FC was without merit. When the order was served to him, attached together with it was a document containing 'Alasan yang Atasnya Perintah itu Dibuat' and 'Pengataan-pengataan Fakta yang Perintah itu Diasaskan' ('the attached document'). When the order was read together with this attached document, the grounds for which the applicant was detained would be apparent and clear to any reader. When the order and the attached document was served to the applicant, the police inspector filled out a form and at the bottom of the same form, the signature of the applicant was found. Hence, the contents of the order and the attached document was fully explained and understood by the applicant. (paras 39 & 40)

(2) Section 6 of the Act does not specify the time within which the detainee is to be produced but merely states that he must be produced 'as soon as possible' after the second remand order is made. The very purpose for why the law requires the applicant to be produced 'as soon as possible' before the IO is for the officer to be thoroughly familiar with the case file and facts and evidence collated and to further examine the witnesses before he meets the applicant to inform him of the inquiry date and his right to counsel and an interpreter. The police would also need to be given sufficient time to locate the witnesses and serve subpoenas on them; 15 days is a reasonably practicable time period for the IO to undertake all these tasks. The word 'forthwith' was construed as 'as soon as reasonably practicable' and not 'then and there' or 'immediately'. The first applicant was first produced before the IO on 10 August 2016 at the police station and was informed that the inquiry would be conducted on 16 August 2016. Therefore, within the ambit of 'as soon as possible' under s. 6 of the Act, the applicant had been brought before the IO within 10 days of the issuance of the second remand order and the IO carried out the inquiry without delay. (paras 17, 19, 20, 23 & 28)

(3) Section 10(2) of the Act only requires the service of a copy of the IO's findings on the applicant. In his affidavit, the police inspector deposed that he had in fact served a copy of the findings with Borang I on the

applicant which was later acknowledged and signed by the applicant. In the same form, there was an endorsement by the police inspector that he had explained the contents of the findings to the applicant in Bahasa Malaysia. Therefore, it was abundantly clear that there was full compliance of the requirements of s. 10(2) of the Act by the police inspector. (paras 33-35)

(4) Section 7B(5) provides that the quorum for any sitting of the Board shall be three members. The word 'quorum' signifies the minimum number that must be present before a meeting could be validly conducted. There were four members present at the material sitting, thus the quorum has been sufficiently met. The fact that there were more members that the requisite quorum present did not invalidate the sitting. (para 49)

(5) In *habeas corpus* proceedings concerning executive detention orders, the court is not concerned with the truth or otherwise of the complaints or allegations against the applicant for that remains a matter for the subjective satisfaction of the executive authority. The subjective satisfaction of the first respondent was not open to judicial review unless *mala fide* could be shown. The applicant had not shown any *mala fide* on the part of the first respondent. He merely stated that when the police inspector was questioned at the sitting of the first respondent, he had apparently admitted that the applicant had not committed any offence. That was merely an allegation that was neither substantiated nor corroborated. This complaint was without merit. (para 53)

(6) It is clearly confirmed in sub-s. (2) of s. 23 of the Act that sub-s. (1) confers general powers on the Minister to make any regulations. These general powers are wide enough to include the power to make regulations for representation to an Advisory Board. The provisions in the Regulations were made in compliance with art. 151 of the FC. Section 19A(4) was inserted to include a specific provision in the Act to reflect the observance of art. 151 of the FC. The enactment of s. 19A(4) strengthens the Minister's powers to make such regulations. (para 47)

Case(s) referred to:

Abdul Razak Baharudin & Ors v. Ketua Polis Negara & Ors And Another Appeal [2005] 4 CLJ 445 FC ***(refd)***

Chng Suan Tze v. The Minister of Home Affairs & Ors And Other Appeals [1988] 1 LNS 162 CA ***(refd)***

Keng Kien Hock v. Timbalan Menteri Keselamatan Dalam Negeri Malaysia & Ors [2007] 5 CLJ 171 CA ***(refd)***

Kerajaan Malaysia & Ors v. Nasharuddin Nasir [2004] 1 CLJ 81 FC ***(refd)***

Kumaran Suppiah v. Dato' Noh Hj Omar & Anor [2006] 4 CLJ 675 FC ***(refd)***

L Rajanderan R Letchumanan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2010] 7 CLJ 653 FC ***(refd)***

Menteri Dalam Negeri & Ors v. Gopal R Subramaniam [2017] 6 CLJ 593 FC ***(refd)***

Muhammad Jailani Kasim v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2006] 4 CLJ 687 FC ***(refd)***

PP v. Karpal Singh Ram Singh & Another Case [1988] 2 CLJ 587; [1988] 1 CLJ (Rep) 249 SC ***(refd)***

Ramoo Maniam lwn. Lembaga Pencegahan Jenayah dan Penguasa Kanan Pusat Pemulihan Khas, Simpang Renggam, Johor (Permohonan Jenayah No: 44-21-09 Tahun 2016 MT Seremban) (Unreported) ***(refd)***

Ramzan Ali Aziz Ahmad v. Pengerusi Lembaga Pencegahan Jenayah Malaysia & Ors [2016] 1 LNS 1286 HC ***(refd)***

SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors [2009] 6 CLJ 705 FC ***(refd)***

Tai Choi Yu v. The Government of Malaysia & Ors [1994] 2 CLJ 174 SC ***(refd)***

Thavaselvan Govindasamy lwn. Lembaga Pencegah Jenayah Dan Yang Lain (Rayuan Jenayah No. 05-269-12-2015(B)) (Unreported) ***(refd)***

Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Liau Nyun Fui [1991] 1 CLJ 458; [1991] 1 CLJ (Rep) 458 SC ***(refd)***

Tirthadeva Sivan Premkumar v. Pengerusi Lembaga Pencegahan Jenayah Malaysia & Ors [2016] 5 CLJ 1007 HC ***(refd)***

Zaidi Zakaria lwn. Lembaga Pencegahan Jenayah dan Penguasa Kanan Pusat Pemulihan Khas, Simpang Renggam (Permohonan Jenayah No: 44-3-01 Tahun 2016 MT Shah Alam) (Unreported) ***(refd)***

Legislation referred to:

Emergency (Public Order and Prevention of Crime) Ordinance 5, 1969, s. 4(1)
Federal Constitution, art. 151(1)(a), (2)
Income Tax Act 1967, s. 104(3)
Interpretation Acts 1948 and 1967, s. 54(2)
Prevention of Crime Act 1959, ss. 4(1), (2)(a), 6, 7B(5), 9(1), (3), 10(2), 11(1), 15A(1), 19A(1), (2), (4), 23

For the appelant - Zafran Zafri Mohd Zaini & Khairunnisa Abdul Malek; M/s Zafri & Partners

For the respondent - Hema Annerina Haja Mydin; FC

Reported by Najib Tamby

JUDGMENT

Vazeer Alam Mydin Meera J:

[1] This is an application for a writ of *habeas corpus* in respect of the applicant's detention pursuant to an order issued under the Prevention of Crime Act 1959 ("the Act") by the first respondent.

[2] The applicant is detained at the Pusat Pemulihan Khas Bentong ("detention centre") pursuant to a detention order dated 7 September 2016 issued under s. 19A(1) of the Act ("order") by the Prevention of Crime Board ("Board"), ie, the first respondent, pursuant to which the applicant is directed to be detained at the detention centre for two years from 7 September 2016. The applicant being dissatisfied with the detention order has filed this *habeas corpus* application for his release, primarily on the grounds that the detention is flawed and unlawful.

[3] The applicant submits that the High Court is seised with jurisdiction and power to review the Board's directions under s. 19A(2) of the Act that reads:

> (2) The direction of the Board under subsection (1) shall be subject to review by the High Court.

[4] The exercise of that supervisory jurisdiction is however subject to s. 15A(1) of the Act which provides that:

> (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Board in the exercise of its discretionary power in accordance with this Act, except in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

[5] Thus, the review of the decision of the Board by this court will be confined to issues of procedural non-compliance or irregularity only. See *Kerajaan Malaysia & Ors v. Nasharuddin Nasir* [2004] 1 CLJ 81 FC; and *Abdul Razak Baharudin & Ors v. Ketua Polis Negara & Ors And Another Appeal* [2005] 4 CLJ 445 FC.

[6] The applicant submits that the order is flawed and unlawful on several grounds, namely:

(i) non-compliance of the requirements stipulated in s. 9 read together with s. 6 of the Act;

(ii) non-compliance of s. 10(2) of the Act;

(iii) infringement of the applicant's constitutional rights under art. 151 of the Federal Constitution;

(iv) non-compliance of art. 151 of the Federal Constitution read together with s. 23 of the Act;

(v) non-compliance of s. 19A(1) and s. 7B of the Act; and

(vi) non-compliance of s. 10(2) of the Act read together with s. 19A(1) of the Act.

[7] It is well settled that in an application for *habeas corpus*, the burden of satisfying the court that the detention is lawful lies throughout on the detaining authority. See *SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors* [2009] 6 CLJ 705; *Chng Suan Tze v. The Minister of Home Affairs & Ors And Other Appeals* [1988] 1 LNS 162.

[8] Further, the Federal Court in *Muhammad Jailani Kasim v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 4 CLJ 687 succinctly laid down the principles of law governing an application for *habeas corpus*, where procedural irregularity is concerned, in the following words:

> ... if a detention is procured by steps which are not regular the court is empowered to set aside the detention order. It means that every step which is necessary for the making of a detention order is subject to review

by the court. The effect of a breach of such procedural requirements had been considered in a number of cases. See, for example, *Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1991] 2 CLJ 1199; [1991] 3 CLJ (Rep) 649; *Low Teng Hai v. Menteri Dalam Negeri, Malaysia & Others* [1992] 2 CLJ 1037; [1992] 2 CLJ (Rep) 816 and *Aw Ngoh Leang v. Inspector General of Police* [1993] 1 CLJ 373. It has been recognised in these cases that a procedural requirement may be mandatory or directory. A mandatory requirement is one that goes to the root of the matter and is of direct relevance to the detention order. The breach of a mandatory requirement will render the detention order invalid without the need to establish any prejudice. The breach of a procedural requirement which is directory will not be significant provided that there is substantial compliance with the rules with no prejudice having been suffered by the detainee.

[9] There is an interplay of several sections of the Act when it comes to the statutory procedural requirements that the investigating and detaining authorities have to comply with from the time of arrest to the issuance of a detention order under s. 19A(1) of the Act. This interplay can be seen work from the chronology of events leading to the order being made, which can be summarised as follows:

Date	Event
11.7.2016	The Applicant was arrested under section 3(1) of the Act.
12.7.2016 to 1.8.2016	Held under 1st remand by order of Magistrate under section 4(1)(a) of the Act.
1.8.2016 to 7.9.2016	Held under 2nd remand by order of Magistrate under section 4(2)(a) of the Act.
16.8.2016	The Inquiry Officer carried out the inquiry under section 9(1) of the Act.
24.8.2016	The Inquiry Officer forwarded a copy the findings to Insp Su Fat A/L Edin On Tong, i.e. the officer having custody of the Applicant.
7.9.2016	The Board issued the Order directing that the Applicant be detained for 2 years from 7.9.2016.
11.11.2016	The Applicant filed this Notice of Motion moving this court for the issuance of a Writ of *Habeas Corpus*.

[10] Therefore, from the inter-connection of these sections, it can be seen that these procedural requirements are linked from the time of arrest, to remand, to inquiry and to the issuance of the direction/order of the Board. Hence, they are an interconnected chain of events that make up a whole transaction, which can be recapitulated as follows:

(a) a detention order under s. 19A(1) will not be issued by the Board unless there is an inquiry by the inquiry officer as prescribed in s. 9;

(b) an inquiry under s. 9 cannot be carried out unless a remand order is issued by a Magistrate under s. 4(2); and

(c) the application for remand under s. 4(2) cannot be made unless there had been issued an earlier remand order under s. 4(1) of the Act.

[11] In *Muhammad Jailani Kassim v. Timbalan Menteri Dalam Negeri, Malaysia & Ors*, (*supra*) the Federal Court reiterated the principle that in detention without trial, every step which is necessary for the making of a detention order is capable of subject to review by the court.

[12] The applicant's first complaint is that there is non-compliance of the procedural requirements prescribed in s. 9 read together with s. 6 of the Act.

Section 6 reads:

> Every person remanded in custody under section 4 shall, if not sooner released, as soon as possible be brought before an Inquiry Officer.

[13] Whilst s. 9(1) reads:

> (1) When any person is brought before an Inquiry Officer under section 6 the Inquiry Officer shall inquire and report in writing to the Board whether there are reasonable grounds for believing that the person is a member of any of the registrable categories.

[14] In the legislative scheme of the Act, the duty and function of the inquiry officer only comes about after the second remand order under s. 4(2)(a) of the Act is made to detain the applicant for a further 38 days. The cumulative effect of both these ss. 6 and 9(1) is that the person remanded shall be brought before the inquiry officer as soon as possible for the purposes of the inquiry and the inquiry officer is then report his findings to the Board.

[15] In this case, the second remand order under s. 4(2)(a) was made on 1 August 2016 and the inquiry officer had met the applicant on 10 August 2016 at the Ibu Pejabat Polis Daerah Putrajaya and informed him that the inquiry will be conducted on 16 August 2016. The inquiry officer further informed the applicant of his right to retain counsel and also an interpreter if he wished to appoint one. The inquiry officer then conducted his inquiry proper on 16 August 2016. Learned counsel for the applicant submits that, in the circumstance, the applicant was not brought before the inquiry officer as soon as possible as stipulated in s. 6 of the Act for there is a gap of 15 days between the issuance of the second remand order on 1 August 2016 and date of inquiry on 16 August 2016. Learned counsel for the applicant further submits that this amounts to inordinate delay in bringing the applicant before the inquiry officer as soon as possible, and is thus a breach of the procedural requirement stipulated in s. 6 of the Act.

[16] The learned Senior Federal Counsel appearing for the respondents argues otherwise and submits that there is no inordinate delay and that the applicant was produced before the inquiry officer as soon as practicable.

[17] My analysis of the arguments is as follows. The production of the person remanded before the inquiry officer under s. 6 of the Act is a mandatory procedural requirement. However, s. 6 does not specify the time within which the detainee is to be produced, but merely states that he must be produced "as soon as possible" after the second remand order is made. Hence, insofar as time is concerned it is directory in nature. In *Tai Choi Yu v. Government of Malaysia* [1994] 2 CLJ 174; [1994] 1 MLJ 677 the Supreme Court had occasion to interpret the words "done with all convenient speed" in s. 104(3) of the Income Tax 1967 and said this:

> Section 104(3) of the Act does not impose any time limit within which the DGIR must notify the appellant that a certificate had been issued under s. 104(1) of the Act. That being so, generally the provision of s. 54(2) of the Interpretation Acts 1948 and 1967 (Consolidated and revised, 1989) would apply. This section states, 'Where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises.'
>
> What is 'convenient speed' has been held by the courts to mean reasonable time within which an act has to be done, but always having regard to the facts and peculiar circumstances of each case.

[18] Similarly in *Kumaran Suppiah v. Dato' Noh Hj Omar & Anor* [2006] 4 CLJ 675, the Federal Court in construing the lawfulness of a detention order made under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 5, 1969 ('Ordinance') and the requirement of time for the Minister to make such an order when none is prescribed had said:

> The fact that s. 4(1) of the Ordinance is silent with regard to the time within which the detention order must be made to take effect does not mean that the Minister has a complete discretion in determining the date. Where no time has been prescribed for the doing of an act in a statutory provision it must be read with s. 54(2) of the Interpretation Act 1967 ("s. 54(2)") which reads as follows:
>
> > Where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises.
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> In cases such as *Tai Choi Yu v. Government of Malaysia* [1994] 2 CLJ 174 and *Ex parte Austco Pty Ltd* [1985] 2 QD R 1 it was observed that what will be "all convenient speed" will depend upon the facts and peculiar circumstances of each case. As s. 4(1) of the Ordinance read with s. 54(2) deals with preventive detention it must be strictly construed.

[19] Analogously, s. 6 of the Act must be read with s. 54(2) of the Interpretation Acts 1948 and 1967 and should be construed strictly as it deals with preventive detention without trial.

[20] In the very recent reported decision of the Federal Court in *Menteri Dalam Negeri & Ors v. Gopal R Subramaniam* [2017] 6 CLJ 593 (Rayuan Jenayah No: 05-153-06-2016(R)) Prasad Abraham FCJ in speaking for court held in construing the meaning of the word "forthwith" in s. 10(2) of the Act held as follows:

> It is to be observed that under section 10(2) of POCA, the court is analysing the length of time that the officer having custody of the applicant takes to serve a copy of the finding of the Inquiry Officer on the Respondent.
>
> ... ...
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> Section 10(2) of POCA does not contain a specified time for service, save to state that where no time is prescribed it shall be done with all convenient speed and as after as the prescribed occasion arises.
>
> ... ...
>
> Having considered all the cases and comments of the learned authors referred to aforesaid, we would hold that word "forthwith" in section 10(2) of POCA is to be construed as "as soon as reasonably practicable" having considered all the facts of the case and not "then and there" or "immediately".

[21] Further in *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors. v. Liau Nyun Fui* [1991] 1 CLJ 458; [1991] 1 CLJ (Rep) 458 SC speaking through Hamid Omar LP had in construing whether the acts of the Minister had been done with all convenient speed held that:

> The correct test to be applied therefore is not on the basis of unreasonable delay but convenient speed.
>
> The learned Judicial Commissioner determined the question before him on the basis of unreasonable delay. This was not a proper approach. The question that was before him was whether the Timbalan Menteri in the particular circumstances of that case had acted with all convenient speed in making the restriction order. Strictly it was for the respondent to show that the Timbalan Menteri had not so acted and not for the Timbalan Menteri to provide an explanation acceptable to the Court.

[22] Therefore, the question is whether the inquiry officer had, under the circumstances, acted with reasonable speed when he first met the applicant on 10 August 2016 and then conducted the inquiry proper on 16 August 2016. In this regard, the burden of establishing that the unreasonable performance of the legal obligation by the first respondent remained on the applicant, the detainee, and never shifts to the respondent. This was reiterated by the Court of Appeal in *Keng Kien Hock v. Timbalan Menteri Keselamatan Dalam Negeri Malaysia & Ors* [2007] 5 CLJ 171 as follows:

> [7] It is clear based on the principles enunciated in the above mentioned two cases, the applicable approach to be adopted is firstly, the appropriate test is not on the delay in carrying out the legal obligation but rather on

whether the legal obligation was carried out with all convenient speed under the circumstances of the case. In other words, it is whether the Minister or Deputy Minister has acted reasonably. And, secondly, the burden of establishing the performance of the legal obligation under such circumstances remained on the applicant, the restricted person and never shifted to the respondent, the Minister.

[8] We are of the view that in order to arrive at a correct finding of fact as to whether the legal obligation was carried out with all convenient speed under the circumstances of such particular case, it shall be the duty of the trial judge to look into all the affidavit evidence adduced by the parties in the proceeding.

[23] I have adopted this approach in evaluating the applicant's complaint. In the present case, the respondent has in the affidavit given reasons why the inquiry officer had set the inquiry for 16 August 2016. The applicant was first produced before the inquiry officer on 10 August 2016 at the Ibu Pejabat Polis Daerah Putrajaya and was informed that the inquiry will be conducted on 16 August 2016. The inquiry officer had further informed the applicant of his right to retain counsel and also an interpreter if he wished to appoint one. Therefore, within the ambit of "as soon as possible" under s. 6 of the Act, the applicant had been brought before the inquiry officer within ten days of the issuance of the second remand order.

[24] The inquiry officer, one Abd Hafiz bin Sheik Abd Hardy in his affidavit dated 2 December 2016 at paras. 10, 11 and 12 explains the reasons why he had set the inquiry to be held on 16 August 2016, ie, 15 days after the issuance of the second remand order on 1 August 2016, and had explained his action from the time he was appointed as the inquiry officer until he made his findings and forwarded his report to the first respondent, in the following terms:

10. Saya sesungguhnya menyatakan bahawa saya mengambil masa selama 15 hari bagi menetapkan tarikh inkuiri kerana:

(a) saya memerlukan masa untuk membaca serta meneliti fail kes ke atas Pemohon yang mengandungi keterangan-keterangan ke atas Pemohon;

(b) saya juga perlu meneliti kesemua dokumen-dokumen yang terdapat di dalam fail Pemohon;

(c) saya perlu menjalankan penyiasatan ke atas saksi-saksi yang dipanggil serta diperiksa oleh saya;

(d) saya perlu memberi masa untuk pihak polis mendapatkan saksi-saksi yang saya perlu di dalam inkuiri ini; dan

(e) saya perlu memberi masa untuk Pemohon mendapatkan peguam belanya semasa inkuiri dijalankan.

11. Saya juga ingin menyatakan bahawa saya telah menjalankan inkuiri terhadap saksi yang mempunyai kaitan dengan penahanan Pemohon untuk mendapatkan keterangan. Saya menegaskan bahawa dalam

melengkapkan inkuiri, inkuiri keatas saksi lain tersebut telah dijalankan mengikut tatacara dan prosedur yang sama dan telah mematuhi peruntukan undang-undang di bawah seksyen 9 Akta tersebut. Walau bagaimanapun, keterangan yang diambil daripada saksi adalah rahsia dan tidak boleh didedahkan. Ini kerana segala maklumat-maklumat tersebut sekiranya didedahkan akan mengancam keselamatan saksi yang memberi keterangan terhadap Pemohon. Oleh itu saya menuntut perlindungan di bawah seksyen 21A Akta tersebut.

12. Setelah mendengar dan menimbangkan keterangan-keterangan dikemukan oleh Pemohon, saksi dan keterangan-keterangan di dalam Fail Kes, saya mendapati dan berpuas hati bahawa ada alasan-alasan yang munasabah bagi mempercayai bahawa Pemohon orang yang menjadi hak perkara inkuiri ialah merupakan orang yang menyara hidupnya sebahagiannya dengan hasil penyeludupan migran, dan oleh itu Pemohon adalah termasuk dalam Kategori Yang Boleh Didaftarkan, Perenggan 6, Bahagian I, Jadual Pertama, Akta tersebut. Pada 24.8.2018, saya telah menyediakan satu Dapatan sepertimana yang dikehendaki di bawah seksyen 10(2) Akta tersebut (selepas ini di rujuk sebagai "Dapatan").

[25] The inquiry officer has explained that he needed time to peruse and consider the case file content which contained the evidence thus far against the applicant. He then had to liaise with the police to examine the witnesses and to record their statements. The inquiry officer also had given the applicant sufficient time for him to retain counsel and/or interpreter in the event that he chose to do so.

[26] The right to counsel is a constitutional right that is accorded to the applicant and the inquiry officer was, in my opinion, correct in making sure that the applicant had sufficient time to exercise this right before the inquiry proper is done on 16 August 2016. Further, I find the explanation given by the inquiry officer for the time taken for him to meet the applicant and fix the inquiry to be reasonable. The law, ie, s. 6 of the Act, does not require the applicant to be produced immediately before the inquiry officer after the second remand order is made. The very purpose for why the law requires the applicant to be produced "as soon as possible" before the inquiry officer is for the officer to be thoroughly familiar with the case file and facts and evidence collated thus far and to further examine the witnesses before he meets the applicant to inform him of the inquiry date and his right to counsel and an interpreter. The police would also need to be given sufficient time to locate the witnesses and serve subpoenas on them. I find that 15 days is a reasonably practicable time period for the inquiry officer to undertake all these tasks. A similar observation was made by my learned brother Wong Teck Meng JC in *Thavaselvan Govindasamy lwn. Lembaga Pencegah Jenayah dan 2 Yang Lain* (Rayuan Jenayah No. 05-269-12-2015(B)), which was affirmed by the Federal Court on appeal.

[27] The inquiry officer in his affidavit also stated that during the period of 1 August 2016 to 16 August 2016, he also had other inquiries to conduct in respect other detainees. Apart from that, he would also have to review the

case file against the applicant that had been forwarded to him and prepare to conduct the inquiry. The complaint against the applicant, an immigration officer, was that he was involved in human smuggling and that he was living off the illegally gotten gains from smuggling migrants into and out of Malaysia, and in particular:

(i) the applicant had arranged for "flying passports" to smuggle three Bangladeshi nationals in and out of Malaysia for RM1,050;

(ii) the applicant had at the KLIA Immigration Counter arranged and facilitated the easy exit for a Lebanese national and received RM300;

(iii) the applicant had at the KLIA Immigration Counter arranged and facilitated the easy ingress into Malaysia three Bangladeshi nationals and had received payments of RM7,200;

(iv) the applicant had at the KLIA Immigration Counter arranged and facilitated the easy ingress into Malaysia of five foreigners from Sudan, Egypt, Palestine, Iraq and Indonesia and had received payments of RM1,750; and

(v) the applicant had at the KLIA Immigration Counter helped to smuggle out of Malaysia 41 Bangladeshi nationals by arranging and facilitating their easy egress and had received payments of RM82,000.

[28] Thus, I accept the submissions of the learned Senior Federal Counsel that the inquiry officer would need sufficient time to familiarise himself with the evidential material against the applicant and to review them, and also to examine the many witnesses before he could properly conduct the inquiry against the applicant. In fact, it would be in the applicant's interest for the inquiry officer to make a proper review of the case against him and be thoroughly familiar with the facts before the inquiry proper is conducted. In the circumstance, I find that the inquiry officer has carried out the inquiry without delay; having had to examine, ensure, and being satisfied that the applicant was indeed involved in the smuggling of foreign nationals and that he was living off the illegal gotten gains from smuggling migrants into and out of Malaysia.

[29] The number of days *per se* before the detainee is brought before the inquiry officer is not the sole determinant to conclude if there has been a breach of s. 6 of the Act. Thus, the applicant's reliance on the two High Court decisions in the cases of *Zaidi Zakaria lwn. Lembaga Pencegahan Jenayah dan Penguasa Kanan Pusat Pemulihan Khas, Simpang Renggam* (Permohonan Jenayah No: 44-3-01 Tahun 2016 MT Shah Alam Unreported) where the detainee was brought before the inquiry officer 11 days after the remand order; and *Ramoo Maniam lwn. Lembaga Pencegahan Jenayah dan Penguasa Kanan Pusat Pemulihan Khas, Simpang Renggam, Johor* (Permohonan Jenayah No: 44-21-09 Tahun 2016 MT Seremban Unreported) where the detainee

was brought before the inquiry officer 25 days after the remand order are not authorities that bind this court. These cases were decided on their own material facts.

[30] The second remand order is valid only for 38 days and the inquiry officer has to complete his inquiry expeditiously. In this case, he had completed his inquiry, made his findings and submitted his report on 24 August 2016, ie, within period of 23 days. The reasonableness of the inquiry officer's action must be inferred from his overall conduct of the case and not in isolation. When the overall conduct of the inquiry officer from beginning to end is considered, I find that he has conducted the inquiry fairly and reasonably, and with convenient speed in accordance to the stipulations in ss. 6 and 9(3) of the Act. Thus, I find that the applicant's complaint that he was not produced before the inquiry officer as soon as possible is unfounded. I am of the opinion that the inquiry officer must be given some latitude within the ambit of the stipulations in ss. 6 and 9 of the Act to commence and conclude the inquiry with convenient speed, whilst at all times keeping within the overall legislative scheme of things and the purpose for which Parliament had enacted the Act.

[31] The applicant's second complaint is the alleged non-compliance of s. 10(2) of the Act that reads:

> If the Inquiry Officer is satisfied that there are reasonable grounds for believing that the person who was the subject of the inquiry is a member of any of the registrable categories, he shall report the grounds, together with his finding, to the Board, and shall forward a copy of his finding to the officer having custody of the person, who shall forthwith serve a copy of the finding of the Inquiry Officer on that person.

[32] The applicant complains that Inspector Su Fat a/l Endin On Tong, ie, the officer having custody of the applicant, did not explain the inquiry officer's findings when a copy of the finding was served on the applicant. The applicant further states if such explanation had been given then he would have lodged the requisite written notice for the finding to be reviewed by the first respondent as provided in s. 11(1) of the Act.

[33] Having considered the facts deposed in the affidavits, I do not find any merit in this complaint. Firstly, s. 10(2) of the Act only requires the service of a copy of the inquiry officer's finding on the applicant. Inspector Su Fat a/l Endin On Tong had deposed in his affidavit that he had in fact served a copy of the finding together with the Borang I on the applicant on 24 August 2016. The service of the finding on the applicant is evidenced by the borang serahan dapatan that is annexed to his affidavit marked as exh. "SF-1". In that Borang I, the following acknowledgment is made by the applicant:

> Saya Khoirul Bin Yahaya No. Kad Pengenalan 800530-02-5113 mengaku telah menerima Dapatan yang tersebut di atas pada 24 haribulan Ogos 2016 dan telah faham isi kandungannya.

[34] In fact, in that same form there is an endorsement by Inspector Su Fat a/l Endin On Tong that he had explained the contents of the finding to the applicant in Bahasa Malaysia.

[35] In the Borang I, which in effect is the notice under s. 11(1) of the Act, the applicant informs the first respondent as follows:

> Saya Khoirul Bin Yahaya yang bernama diatas BERPUAS HATI dengan Dapatan yang dibuat di bawah Seksyen 10(2) dan TIDAK BERCADANG membuat Kajian Semula.

[36] The Borang I was signed by the applicant and dated 24 August 2016. Thus, when the contemporaneous documentary evidence is examined, it is abundantly clear that there is full compliance of the requirements of s. 10(2) of the Act by Inspector Su Fat a/l Endin On Tong.

[37] Now, I move on to the third complaint, ie, the alleged infringement of art. 151(1)(a) of the Federal Constitution, which reads:

> (1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention:
>
> (a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;

[38] The applicant's complaint is that he was not informed of the grounds for his detention as prescribed in art. 151. In this regard, the applicant further refers to s. 19A(4) of the Act that reads:

> (4) A copy of every detention order made by the Board under subsection (1) shall as soon as may be after the making of the order be served on the person to whom it relates, and every such person shall be entitled to make representations to an Advisory Board constituted under Clause (2) of Article 151 of the Federal Constitution in accordance with the prescribed procedures.

[39] I find that this complaint is also without merit. The order dated 7 September 2016 was served on the applicant on 7 September 2016. Attached together with the order is a document containing the "Alasan Yang Atasnya Perintah Itu Dibuat" and "Pengataan-pengataan Fakta Yang Perintah Itu Diasaskan". When the order is read together with this attached document, containing the reasons or grounds for making the detention order, as well as the facts giving rise to that order, the grounds for which the applicant was detained would be apparent and clear to any reader.

[40] When the order together with the attached document was served on the applicant, Inspector Su Fat a/l Endin On Tong had filled out a form, and at the top of that form, the following endorsement bearing Inspector Su Fat a/l Endin On Tong's signature is found:

A Saya Insp G/19199 Su Fat a/l Endin On Tong bertandatangan dibawah memperakui bahawa saya pada hari ini 7 September 2016 jam 2200hrs telah menyampaikan kepada KHOIRUL BIN YAHAYA No. Kad Pengenalan 800530-02-5113:

(a) satu salinan Perintah Tahanan di bawah subseksyen 19A(1) Akta
B Pencegahan Jenayah 1959;

(b) satu salinan penyata mengenai alasan-alasan yang atasnya Perintah itu dibuat dan pengataan-pengataan fakta yang atasnya perintah itu diasaskan;

dan telah menerangkan kepada orang tahanan tersebut mengenai haknya
C membuat representasi terhadap Perintah Tahanan itu.

[41] And at the bottom of that same form is found the following endorsement bearing the signature of the applicant:

Saya Khoirul Bin Yahaya No. Kad Pengenalan 800530-02-5113 mengaku telah menerima semua dokumen yang tersebut di butiran (a) dan (b) di
D atas pada 7 haribulan September 2016 dan telah faham isi kandungannya serta faham mengenai hak saya untuk membuat representasi terhadap Perintah Tahanan itu.

[42] Hence, it is clear from these endorsements that the contents of the order and the "penyata mengenai alasan-alasan yang atasnya perintah itu
E dibuat dan pengataan-pengataan fakta yang atasnya perintah itu diasaskan" have been fully explained and understood by the applicant. Thus, the applicant, an immigration officer and an educated person, had full knowledge of the reasons for his detention. Further, the applicant also acknowledged that he understood his right to make representation to the Advisory Board
F constituted under cl. (2) of art. 151 of the Federal Constitution in accordance with the prescribed procedures.

[43] The thrust of the applicant's complaint in this regard is that in the middle of the aforesaid form a section is incomplete. That section contains the following endorsement:

G

Isi kandungan butiran (a) dan (b) dan penerangan yang tersebut diatas telah diterangkan kepada orang tahanan semasa penyampaian dilakukan dalam bahasa/loghat ... oleh:

Tandatangan ...

H Nama Jurubahasa ...

No. Kad Pengenalan/Kad Kuasa ...

[44] Learned counsel for the applicant contends that the fact that this section of the form had been left incomplete indicates that the applicant was
I not explained the reasons for his detention. Inspector Su Fat a/l Endin On Tong has explained in his affidavit that he had inadvertently failed to complete this portion of the form and that he had in fact explained the order and the reasons for his detention in Bahasa Malaysia and that the applicant understood it.

[45] The aforementioned form, which is the basis of the applicant's contention, is not a statutory form. It is merely an administrative form that is used to document the fact of the service of the order and its annexure, and to also document the fact that the contents of the detention order and its attendant documents had been explained to and understood by the applicant. Thus, I find that when the entire form is examined, it is clear that the order and its annexure had been explained to the applicant and that the applicant had understood its content. The incomplete mid-portion of the form does not show that the applicant had been deprived of his rights under art. 151 of the Federal Constitution. In any event, the applicant being an educated person and who at that point time was a serving officer with the immigration department would have been able to read and understand by himself the reasons for his detention as contained in the order and the "penyata mengenai alasan-alasan yang atasnya perintah itu dibuat dan pengataan-pengataan fakta yang atasnya perintah itu diasaskan".

[46] The fourth complaint of the applicant is that there is non-compliance of art. 151 of the Federal Constitution read together with s. 23 of the Act. The applicant's argument in this regard goes as follows. According to s. 19A(4) of the Act, the applicant shall be entitled to make representations to an Advisory Board constituted under cl. (2) of art. 151 of the Federal Constitution in accordance with the prescribed procedures. The prescribed procedure is found in the Prevention of Crime (Advisory Board Procedure) Regulations 2014 ("the Regulations"), which was made by the Minister pursuant to powers under s. 23 of the Act. Learned counsel for the applicant submits that s. 23 of the Act does not give powers to make regulations as regards the formation, role, function and procedural rules of the Advisory Board. Therefore, the applicant's counsel submits that the Regulations are *ultra vires*, invalid and void.

[47] I do not wish to delve too deeply into the arguments by both parties on this issue. Suffice to say that similar argument was taken up in previous cases, notably in *Tirthadeva Sivan Premkumar v. Pengerusi Lembaga Pencegahan Jenayah Malaysia & Ors* [2016] 5 CLJ 1007, where my learned brother Choo Kah Singh JC in dismissing the argument had given very detailed reasons, which reasons I am in total agreement with. This is what my learned brother said:

> Third Ground: Whether The Prevention Of Crime (Advisory Board Procedure) Regulations 2014 Purporting To Have Been Made By The Minister Under s. 23 Of The Act Were Within The Powers Conferred By The Act
>
> [71] The argument of the applicant's counsel was that when the regulations were made in 2014, there was no provision in the parent law, ie the Act, for the Minister to make such regulations, in particular, the provision for representation to the Advisory Board. It was only in September 2015 that Parliament amended the Act and inserted s. 19A(4) introducing provision for representation to the Advisory Board.

[72] Section 19A(4) states as follows:

> A copy of every detention order made by the Board under subsection (1) shall as soon as may be after the making of the order be served on the person to whom it relates, and every such person shall be entitled to make representation to an Advisory Board constituted under Clause (2) of Article 151 of the Federal Constitution in accordance with the prescribed procedures.

[73] The above amendment was made through the Prevention of Crime (Amendment) Act 2015 (Act A1484); the above provision was inserted in the Act and it took effect on 1 September 2015.

[74] The respondents' counsel urged this court to refer to s. 23(1) of the Act which states as follows:

> (1) The Minister may make regulations for carrying out the purposes of this Act.
>
> (2) Without prejudice to the generality of the powers conferred by subsection (1), the regulations may:
>
> (a) ...;
>
> (b) ...
>
> (ba) ...;
>
> (c) ....
>
> (3) ....

[75] Before s. 19A(4) was inserted into the Act, there existed a general provision, ie s. 23(1), which conferred on the Minister the power to make regulations for carrying out the purposes of the Act. This section would, in my opinion, be sufficient to empower the Minister to make regulations, such as the 2014 Regulations.

[76] It is clearly confirmed in sub-s. (2) of s. 23 that sub-s. (1) confers general powers on the Minister to make any regulations. These general powers are wide enough to include the power to make regulations for representation to an Advisory Board. The provisions in the 2014 Regulations for representation to an Advisory Board were made in compliance with art. 151 of the Federal Constitution.

[77] The insertion of s. 19A(4) on 1 September 2015 was to include a specific provision in the Act to reflect the observance of art. 151 of the Federal Constitution. Although s. 23(1) of the Act is a general provision; it does not limit the Minister's power to make regulations for representation to the Advisory Board. The enactment of s. 19A(4) strengthens the Minister's powers to make such regulations.

[48] Learned Senior Federal Counsel submits that the appeal to the Federal Court against that decision was dismissed and the reasoning of my learned brother Choo Kah Singh JC was affirmed. Similarly, in *Ramzan Ali Aziz Ahmad v. Pengerusi Lembaga Pencegahan Jenayah Malaysia & Ors* [2016] 1 LNS

1286, my learned sister Hayatul Akmal binti Abdul Aziz JC had also dismissed the very same argument on essentially the same reasoning. Again, learned Senior Federal Counsel submits that the Federal Court has affirmed these decisions on appeal. Thus, I too have rejected this argument.

[49] The applicant's fifth complaint is that there is non-compliance of the stipulations in ss. 19A(1) and 7B of the Act. These sections when read together provide that the quorum for any sitting of the first respondent shall be three members, where one of them shall be the Chairman or the Deputy Chairman. The applicant contends that the sitting at which the first respondent made its decision to issue the order, the meeting was conducted by the Deputy Chairman and attended by three other members. Thus, there were four members of the first respondent who were present at that meeting, and this the applicant contends is a breach of ss. 19A(1) and 7B of the Act. Now, this is an argument that is absolutely devoid of any substance. Section 7B(5) of the Act provides that the quorum for any sitting of the Board shall be three members. The word quorum signifies the minimum number that must be present before a meeting can be validly conducted. Here, there were four members who were present at the material sitting, thus the quorum has been sufficiently met. The fact that there were more members than the requisite quorum present does not invalidate the sitting.

[50] The sixth and final challenge that the applicant mounts is the allegation that there is non-compliance of ss. 10(2) and 19A(1) of the Act. The specific complaint is that when Inspector Su Fat a/l Endin On was questioned at the sitting of first respondent that deliberated the applicant's case, he had apparently admitted that the applicant had not committed any offence. Therefore, learned counsel for the applicant submits that the order issued by the first respondent and confirmed by the Advisory Board on review and assented to by the Yang diPertuan Agong is flawed and not in accordance to the law.

[51] Now, it is trite law that in *habeas corpus* proceedings concerning executive detention orders, the court is not concerned with the truth or otherwise of the complaints or allegations against the applicant for that remains a matter for the subjective satisfaction of the executive authority. See *PP v. Karpal Singh Ram Singh & Another Case* [1988] 2 CLJ 587; [1988] 1 CLJ (Rep) 249 SC. The Federal Court in *L Rajanderan R Letchumanan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2010] 7 CLJ 653 reiterated this principle and affirmed that the court is not:

> ... concerned with the vagueness, sufficiency or relevancy of the grounds of detention which is the sphere of the subjective exercise of the Minister's discretion under the various executive detention legislations unless *mala fide* on his part is shown.

[52] Thus, the subjective satisfaction of the first respondent, as the body issuing the executive detention order, for the grounds of detention, is not open to judicial review, unless *mala fide* can be shown. It is not for the court to investigate the sufficiency of the reasons or grounds relied on by the first respondent in making the detention order. This principle is further fortified by the statutory provisions in s. 15A(1) of the Act, which states that:

> (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Board in the exercise of its discretionary power in accordance with this Act, except in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

[53] In this case, the applicant has not shown any *mala fide* on the part of the first respondent. The applicant merely states that when Inspector Su Fat a/l Endin On was questioned at the sitting of first respondent that deliberated the applicant's case, he had apparently admitted that the applicant had not committed any offence. That is merely the allegation of the applicant. However, it must be noted that this allegation is unsubstantiated and is not corroborated by the notes of proceedings. Inspector Su Fat a/l Endin On has as a matter of fact refuted this allegation in his affidavit. As alluded to earlier, it is not the function of the court to delve into the merits of the case against the applicant or question the subjective findings and decisions of the first respondent. Thus, I find that this complaint is also without any merit.

[54] In the final analysis, I find that the applicant has not established any of the grounds on which a writ of *habeas corpus* can be issued. Wherefore, I dismissed the application.